Supreme Court, U.S.
FILED
NOV 28 2000
CLERK

NOV 28, 2000

(21)

No. 00-836

In the Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

vs.

PALM BEACH COUNTY CANVASSING BOARD, ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF OF THE STATES OF IOWA, CALIFORNIA, CONNECTICUT, HAWAII, INDIANA, MAINE, MARYLAND, MASSACHUSETTS, MONTANA, NEVADA, NEW MEXICO, OKLAHOMA, OREGON, AND RHODE ISLAND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

THOMAS J. MILLER
Attorney General of Iowa
*DENNIS W. JOHNSON
Solicitor General of Iowa
TAM B. ORMISTON
Deputy Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5164

* Counsel of Record

[additional counsel listed on inside cover]

BEST AVAILABLE COPY

BILL LOCKYER
Attorney General
State of California

RICHARD BLUMENTHAL
Attorney General
State of Connecticut

EARL I. ANZAI
Attorney General
State of Hawaii

KAREN M.
FREEMAN-WILSON
Attorney General
State of Indiana

ANDREW KETTERER
Attorney General
State of Maine

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

THOMAS F. REILLY
Attorney General
Commonwealth of Massachusetts

JOSEPH P. MAZUREK
Attorney General
State of Montana

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

PATRICIA A. MADRID
Attorney General
State of New Mexico

DREW EDMONDSON
Attorney General
State of Oklahoma

HARDY MYERS
Attorney General
State of Oregon

SHELDON WHITEHOUSE
Attorney General
State of Rhode Island

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. BASIC CONCEPTS OF FEDERALISM ARE AT THE CORE OF THIS CASE 3

II. THE CONSTITUTION AND CONGRESS HAVE GIVEN THE STATES CONSIDERABLE POWER TO CONTROL ELECTIONS FOR PRESIDENT OF THE UNITED STATES 4

A. The State Legislatures Are Vested With the Power to Enact Statutory Schemes Regulating the Conduct of Elections 4

B. The State Judiciaries Are Vested With the Power to Interpret the State Election Codes 6

III. THERE IS NO REASON IN THIS CASE FOR THE COURT TO ABANDON BASIC PRINCIPLES OF FEDERALISM BY INTERFERING WITH THE DECISION OF THE FLORIDA SUPREME COURT 8

A. The Florida Supreme Court's Decision Did Not Constitute A "Post-Election" Change in the Law 9

TABLE OF CONTENTS — continued

Page

B. The Florida Supreme Court Did Not Encroach Upon the Power of the Legislature 10

IV. OVERTURNING THE DECISION OF THE FLORIDA SUPREME COURT WOULD HAVE SERIOUS ADVERSE CONSEQUENCES FOR BOTH THE FEDERAL AND STATE JUDICIARIES 11

CONCLUSION 12

TABLE OF AUTHORITIES

CASES: **Page(s)**

Anderson v. Celebrezze, 460 U.S.780 (1983) 6

Bank of Hamilton v. Lessee of Dudlee, 27 U.S. 492 (1829) 6

Burdick v. Takushi, 504 U.S. 428 (1992) 6

Elmendorf v. Taylor, 23 U.S. 152 (1825) 7

Enterprise Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157 (1917) 7

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 120 S. Ct.1291 (2000) 10

Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989) 10

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) 10

McPherson v. Blacker, 146 U.S. 1 (1892) 5, 11

Munro v. Socialist Workers Party, 479 U.S. 189 (1986) 6

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 9

Printz v. United States, 521 U.S. 898 (1997) 4

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 7

TABLE OF AUTHORITIES - continued

Page(s)

Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976) 10

Ratzlaf v. United States, 510 U.S. 135 (1994) 10

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) 9

Roudebush v. Hartke, 405 U.S. 15 (1972) 6

Storer v. Brown, 415 U.S. 724 (1974) 6

United States v. Estate of Romani, 523 U.S. 517 (1998) . 10

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) 4

Williams v. Rhodes, 393 U.S. 23 (1968) 8

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., art 1, § 4 5

U.S. Const., art. II, §1 ..... 2, 4, 5

3 U.S.C. § 5 ..... 2, 5

42 U.S.C. § 1971 8

INTEREST OF THE *AMICI CURIAE*

This case comes before the Court under the most extraordinary circumstances. The tumultuous presidential election has created an emotionally charged atmosphere and raised a multitude of issues in the state and federal courts, many of which are questions of first impression. At the core of this controversy are basic questions of federalism which could affect the delicate relationship between the federal and state governments, and the judicial branches of those governments. These principles, which are basic to our federal system of government, must not be overlooked in the midst of heated political rhetoric.

The *amici* States have a strong interest in preserving the rights of the individual states to control the election of presidential electors. The *amici* States want to ensure that the state judiciaries remain free to interpret state laws governing elections, without interference by the federal courts, as they have done for nearly 200 years. And the *amici* States have a compelling interest in guarding against the erosion of these fundamental principles of federalism in any way that could impair the rights of the states to govern their affairs in other matters that have been entrusted to them by the United States Constitution.

This Court has a unique opportunity to clarify for the American public the basic workings of the state and federal judiciaries and their proper roles in our federal and state schemes of government. The *amici* States believe that this Court can take a significant step toward healing the nation from the divisiveness that has resulted from the presidential election and in giving credibility to the final result of this election – whatever that might be. The *amici* States respectfully request this Court to undertake that process with due regard for fundamental principles of federalism.

SUMMARY OF THE ARGUMENT

The fundamental question before the Court is whether the state or federal courts are the final arbiters of state law. This case is based on a claim that the Florida Supreme Court retroactively changed the law and impinged on the Florida Secretary of State's discretion when it interpreted Florida's election code, and thereby violated the due process clause of the United States Constitution and 3 U.S.C. § 5. Closely related is the claim that the Florida Supreme Court changed the election laws passed by the Florida legislature, in derogation of the legislature's constitutional right to control the manner in which presidential electors are appointed pursuant to Article II, section 1 of the United States Constitution.

Because the actions of the Florida Supreme Court in interpreting state law are being reviewed by the United States Supreme Court, fundamental questions of federalism become paramount. State courts traditionally have been charged with the responsibility of interpreting state law. For nearly 200 years, this Court has deferred to state courts on questions regarding the meaning of state laws. Any departure from that tradition would significantly alter fundamental notions of federalism.

There is no justification in this case for such an erosion of federalism. The Florida Supreme Court did not retroactively change the law. It simply interpreted a state law, according to traditional rules of statutory construction, with the result being that the Florida Supreme Court explained its interpretation of what the statutory law had been since the date it was adopted. The Florida Supreme Court was guided by the cardinal principle that its task, in interpreting ambiguous and inconsistent statutes, was to give effect to the intent of the Florida legislature.

If this Court were to superimpose its judgment on that of the Florida Supreme Court in matters of state law, such action would constitute a remarkable intrusion by the federal government into the province of the state judiciary. It would

constitute a significant erosion of fundamental principles of federalism, and could have effects far beyond this case.

If this Court were to strike down the Florida Supreme Court's interpretation of a Florida statute as a retroactive change of the law, it would find itself on a slippery slope of claims alleging "retroactive" application of laws and *ex post facto* laws whenever a court interpreted a statute for the first time. Indeed, the federal courts themselves would be beset with claims that they had retroactively changed the laws whenever they engaged in statutory construction.

Under basic principles of comity and federalism, this Court should respect the Florida Supreme Court as the final arbiter of state law and dismiss this petition.

ARGUMENT

I. Basic Concepts of Federalism Are At the Core of This Case

Amidst the furor over the presidential election, it is important to reflect on one of the basic principles underlying our democracy:

> Federalism was our nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system, unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. It is appropriate to recall these origins, which instruct us as to the nature of the two different governments created and confirmed by the Constitution.

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

The dual sovereignty of the states and the federal government is manifested in the Constitution both implicitly and explicitly. The states' residual sovereignty was implied by Article I, section 8, which conferred upon Congress only certain discrete, enumerated powers. The sovereignty of the states was later explicitly recognized by the Tenth Amendment, which acknowledged that those "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Printz v. United States*, 521 U.S. 898, 919-20 (1997).

No power of the states is more clearly recognized in the Constitution than the power to control elections – particularly with regard to the appointment of electors for President of the United States. *See* U.S. Const. art. II, §1. It is that constitutional power in particular, and the sovereign powers of the states in general, which are now being challenged before this Court.

II. The Constitution and Congress Have Given The States Considerable Power to Control Elections for President of the United States.

A. The State Legislatures Are Vested With the Power to Enact Statutory Schemes Regulating the Conduct of Elections

The authority to control the appointment of electors for President of the United States is vested in the states by virtue of both the United States Constitution and federal statute. Article II, section 1, clause 2 of the Constitution gives the states exclusive control over the process by which presidential electors are chosen: "Each state shall appoint, *in such manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators and Representatives to which the

State may be entitled in the Congress." U.S. Const., art. II, § 1, cl.2 (emphasis added).

Congress has confirmed the power of the states in this area by authorizing the states to establish procedures for conclusively resolving disputes over the appointment of electors:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination . . . shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution . . . .

3 U.S.C. § 5.

This Court has recognized the plenary authority of the state legislatures to control the manner of selecting presidential electors. In *McPherson v. Blacker*, 146 U.S. 1 (1892), the Court held that the Constitution "recognizes that the people act through their representatives in the legislature, and leaves it to the *legislature exclusively* to define the method of effecting the object [of selecting presidential electors]." *Id.* at 27. (*Emphasis added*).

The states have been given similar authority to control the manner in which United States Senators and members of the House of Representatives are elected to office. U.S. Const. art.1, § 4. Although those powers are not as plenary as the powers regarding presidential electors, they are still quite extensive: "This court has recognized the breadth of those

powers . . . ." *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972). *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-96 (1986); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

This Court has acknowledged that, as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and orderly. As a result, "the States have evolved *comprehensive, and in many respects complex, election codes* regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates." *Storer v. Brown*, 415 U.S. 724, 730 (1974) (*emphasis added*).

B. The State Judiciaries Are Vested With the Power to Interpret the State Election Codes

The constitutional provisions and federal law vesting power in the states to control the manner of elections and, in particular, the manner of selecting the electors for President of the United States, have necessitated the adoption of comprehensive, often complex election codes by the states. The statutory scheme enacted by Florida, at issue in this case, is but one example of such a scheme. A foreseeable, indeed, unavoidable consequence of detailed legislative schemes of this type is that statutory ambiguities and inconsistencies arise. When this occurs, it is incumbent upon the judicial branch to interpret those statutes, to clarify their ambiguities, and to resolve their inconsistencies where possible. "The judicial department of every government is the rightful expositor of its laws . . . ." *Bank of Hamilton v. Lessee of Dudlee,* 27 U.S. 492, 524 (1829).

In our federal system based upon dual sovereignty, when questions of state law arise, the *state* judiciary is the proper and final arbiter of the meaning of the state statute. This was explained as follows by Chief Justice Marshall:

> This Court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the Courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognised, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government . . . . We receive the construction given by the Courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute . . . . [T]he construction given by the Courts of the several States to the legislative acts of those States, is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States.

Elmendorf v. Taylor, 23 U.S. 152, 159-60 (1825).

Indeed, as a general proposition, it is beyond dispute that, "[w]here a state court has interpreted a provision of state law, [the Court] cannot ignore that interpretation, even if it is not one that we would have reached if we were construing the statute in the first instance." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 412 (1992). Even where this Court is empowered to protect an underlying federal right that is threatened by the interpretation of state law, it will not do so unless the interpretation is "so certainly unfounded that it properly may be regarded as essentially arbitrary." If the interpretation has "fair support" in state law, the Court is "not at liberty to inquire whether it is right or wrong, but must accept it, as [it does] other state decisions of non-Federal questions." *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917).

When the states were given the power to regulate the manner in which elections are conducted, that power necessarily involved both the state legislatures and the state judiciaries. The legislatures were given the authority and the responsibility to enact appropriate statutory schemes to govern the conduct of elections. The state judiciaries were charged with the responsibility to interpret those statutes, just as they interpret all other statutes enacted by their state legislatures. And in our federalist system of dual sovereignty, the federal courts defer to the state courts on the interpretation of state law. Nearly two centuries of precedent and time-honored principles of federalism mandate that the Florida Supreme Court's interpretation of Florida law be considered final.

III. There Is No Reason In This Case For The Court to Abandon Basic Principles of Federalism By Interfering With The Decision of The Florida Supreme Court

The petitioner has attempted to federalize a state law issue by characterizing the Florida Supreme Court's decision as one which substantively changed Florida's election laws after the date of the election and infringed upon the right of the legislature to control the manner of selecting presidential electors.[1] An examination of the Florida Supreme Court's

---

[1] It should be noted that this case does not involve claims that the Florida election code, as interpreted by the Florida Supreme Court, violates the Voting Rights Act, 42 U.S.C. § 1971, or the First or Fourteenth Amendments to the United States Constitution because of any course of conduct sanctioned by the Florida Supreme Court. If such prohibited conduct occurred as a result of state legislative or judicial action, this Court would become involved. *See, e.g., Williams v. Rhodes*, 393 U.S. 23 (1968). No such prohibited conduct is alleged in this case. The constitutional claims before this Court arise primarily out of the fact that the Florida Supreme Court interpreted the Florida election code after election day, thereby allegedly retroactively changing the law in violation of due process and other

decision indicates, however, that it was nothing more than the normal exercise by the judiciary of its authority to interpret state legislation, to clarify ambiguities in that legislation, and to resolve inconsistencies in that legislation, all for the purpose of effectuating the intent of the Florida legislature. Accordingly, this Court should not permit itself to be drawn into reviewing the substance of the Florida Supreme Court's interpretation.

A. The Florida Supreme Court's Decision Did Not Constitute A "Post-Election" Change in the Law

The Florida Supreme Court's decision consisted entirely of interpreting and reconciling Florida statutes which were inconsistent and ambiguous. By interpreting the statutes after the date of the election, however, the Florida Supreme Court did not engage in "post-election" lawmaking. Indeed, this Court has recognized that "judicial construction of a statute is an authoritative statement of *what the statute meant before as well as after the decision* of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 (1994) (*emphasis added*). "[W]hen this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Id.* at 313 n.12. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 215 (1995). Consistent with these principles, the decision of the Florida Supreme Court constitutes an explanation by that court of its understanding of what the Florida statutes have meant since the date they became law, which was prior to the election. That does not constitute "post-election" lawmaking.

The analysis utilized by the Florida Supreme Court in interpreting the Florida election statutes was neither unusual nor surprising. The Florida Supreme Court attempted to determine

---

constitutional provisions. If the Florida court had interpreted the Florida election code before the election, it is unlikely that this case would be before the Court.

the legislature's intent, "the polestar that guides a [Florida] court's inquiry into the provisions of the Florida Election Code." (App.23a). The Court followed traditional rules of statutory construction throughout its opinion. (App. 23-26a). It applied the rule that specific statutes control general ones, which this Court also uses routinely. *See, e.g. Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524-26 (1989); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 151 (1976). It relied on the canon that newer statutes control older ones, a perfectly logical presumption that this Court also applies. *See, e.g., United States v. Estate of Romani*, 523 U.S. 517, 532 (1998). The Court applied the rule that statutes should be interpreted in a manner that avoids rendering other statutory provisions meaningless or absurd, an approach that also is utilized by this Court. *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 141 (1994); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Finally, the Florida Supreme Court applied the canon that statutes should be read in their entirety, which is also applied in this Court. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S. Ct. 1291, 1300 (2000). Against this background, the Florida Supreme Court plainly did not "enact" new law; it simply interpreted laws which were in existence prior to election day.

B. The Florida Supreme Court Did Not Encroach Upon The Power of The Legislature

Petitioners's argument that the Florida Supreme Court encroached upon the power of the Florida legislature to control the manner in which presidential electors are appointed, in violation of Article II, section 1 of the Constitution, ignores the reality of how state governments function. The Florida legislature had a duty under the Constitution and federal law to enact legislation governing the manner in which presidential electors would be elected. It was the proper function of the judiciary to interpret those election laws when interpretation became necessary as a result of ambiguities, inconsistencies, or

other uncertainties in the meaning of those laws. Rather than encroaching on the authority of the legislature, the Florida Supreme Court was attempting to give effect to the legislature's statutory scheme. That is exactly what a state supreme court is supposed to do. Therefore, it is incumbent upon this Court, as a federal court, to respect the Florida Supreme Court's interpretation of its state election laws. *McPherson v. Blacker*, 146 U.S. 1, 23 (1892) ("We are not authorized to revise the conclusions of the state court on these matters of local law.")

IV. Overturning the Decision of the Florida Supreme Court Would Have Serious Adverse Consequences for Both the Federal and State Judiciaries

The states are clearly charged with the duty to establish the manner of selecting presidential electors. The Florida legislature has performed its function by adopting the state election laws in question. The Florida Supreme Court, likewise, has performed exactly as a Supreme Court should. It would be highly offensive to basic principles of federalism for this court to superimpose its judgment on the Florida Supreme Court or to disagree or change the interpretation of state law rendered by that court. Indeed, such action by this Court would be a remarkable intrusion into the province of the state judiciary.

If this Court accepts the claim that the Florida Supreme Court invaded the province of the legislature by merely interpreting the Florida election code, it will fundamentally alter the separation of powers that presently exists between the legislative and judicial branches of government. Such a decision by this Court would diminish the authority of the state judiciary to be the final arbiter of the meaning of state law, leaving every state court decision open to appeal to the federal courts on due process grounds. And, if this Court superimposes its judgment on that of the Florida Supreme Court, it might find itself or the lower federal courts embroiled in the process of managing the final resolution of the Florida election disputes.

If this Court were to hold that the Florida Supreme Court's interpretation of Florida law constituted a retroactive "change" in the law, rather than an explanation of what the law had always been, this Court would be opening the door to a flood of due process claims. Whenever a court adopted a new interpretation of a statute, or answered a question of statutory interpretation for the first time, individuals adversely affected by the decision could claim a violation of due process rights. Whenever the courts were required to interpret statutes with civil or criminal penalties, such as consumer fraud statutes, to apply to new factual situations, adversely affected parties could claim a violation of due process rights. Any new interpretation of a criminal statute could lead to claims of *ex post facto* laws in violation of Article I, section 10 of the Constitution. Indeed, this Court itself engages in statutory construction of federal statutes. Litigants could very well claim that new interpretations of federal statutes by this Court, or other federal courts, give rise to claims that their due process rights were violated.

Although the presidential election is unquestionably important to the people of this nation, upholding the basic principles of federalism is equally important and perhaps could have longer lasting effects on ths nation than the decision as to who will be our next president. This Court should follow well-recognized principles of comity and federalism and respect the decision of the Florida Supreme Court as a binding interpretation of Florida law, regardless of whether it agrees with the substance of the Florida court's analysis. To do otherwise would plunge this Court into the province of the state judiciary, in substantial derogation of the basic principles of federalism which have guided this country since its inception.

CONCLUSION

This Court should be guided by fundamental principles of federalism in resolving the issues presented by this highly charged case. The matters presented to the Court are truly

matters of state law, and it is appropriate that they be resolved by the Florida Supreme Court, without interference from the federal government. The Court is respectfully urged to dismiss the petition.

THOMAS J. MILLER
Attorney General of Iowa
*DENNIS W. JOHNSON
Solicitor General of Iowa
TAM B. ORMISTON
Deputy Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5164

* Counsel of Record

BILL LOCKYER
Attorney General
State of California

JOSEPH P. MAZUREK
Attorney General
State of Montana

RICHARD BLUMENTHAL
Attorney General
State of Connecticut

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

EARL I. ANZAI
Attorney General
State of Hawaii

PATRICIA A. MADRID
Attorney General
State of New Mexico

KAREN M.
FREEMAN-WILSON
Attorney General
State of Indiana

DREW EDMONDSON
Attorney General
State of Oklahoma

ANDREW KETTERER
Attorney General
State of Maine

HARDY MYERS
Attorney General
State of Oregon

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

SHELDON WHITEHOUSE
Attorney General
State of Rhode Island

THOMAS F. REILLY
Attorney General
Commonwealth of Massachusetts

NOVEMBER 28, 2000